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No. 96-961

In The

Supreme Court of the United States

October Term, 1996

TONNELLE AVENUE BOOKS & VIDEO, INC.,

Petitioner,

vs.

TOWNSHIP OF NORTH BERGEN, NEW JERSEY, TOWNSHIP OF NORTH BERGEN BOARD OF COMMISSIONERS, NICHOLAS J. SACCO, FRANK GARGUILEO, LEO GATTONI, JR., MICHAEL DI GIOVANNI, THOMAS LIGGIO, EDWARD F. RANNOU, Individually,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 4.17 (7th ed. 1993) 10

The Respondent, Township of North Bergen, New Jersey, Township of North Bergen Board of Commissioners, Nicholas J. Sacco, Frank Garguilo, Leo Gattoni, Jr., Michael DiGiovanni, Thomas Liggio, Edward F. Rannou, Individually ("North Bergen") respectfully requests that the court deny the Petition for a Writ of Certiorari seeking review of the opinion of the Superior Court of New Jersey, Appellate Division filed July 17, 1996, reproduced in the Appendix to the Petition for a Writ of Certiorari ("App.") at App. 1a - 8a.

STATEMENT OF THE CASE

North Bergen respectfully opposes the Petition for Writ of Certiorari which is at best confusing. The Petition selectively utilizes "facts" which aren't supported in the record and cites decisions not made or requested.

A. Course of Proceedings and Disposition of the Case Below.

Petitioner, Tonnelle Avenue Books & Video, Inc. ("Tonnelle") operated a book and video business at 501 Tonnelle Avenue in the Township of North Bergen, It appears that Tonnelle commenced operations on or about July 15, 1991. Unfortunately, Tonnelle never made an effort to obtain the requisite approvals, permits and licenses from North Bergen.

On July 15, 1991, an inspection of the premises at 501 Tonnelle Avenue in North Bergen was conducted by the Licensing Bureau and Construction Code Official of the Township. The inspection revealed that the business was operating without the appropriate business license as required by Township Ordinance 107-85. It was also determined that Tonnelle failed to obtain the necessary construction permits and Certificate of Occupancy. In addition, the sign on the premises violated the Township Zoning Ordinance and was installed

without the required permit. After the inspection, the agent on the premises was advised that the business had to be closed for failure to obtain the appropriate business license.

Thereafter, application was made by Tonnelle for a business license (July 17, 1991), a Building Construction Permit (July 24, 1991), a Certificate of Occupancy (July 25, 1991) and an Electrical Construction Permit (July 26, 1991).

A business license was never issued by the Township. However, a Building Permit was issued on July 24, 1991 and an Electrical Permit issued on July 30, 1991. A Certificate of Continued Occupancy was issued on July 29, 1991. The Construction Code Official, Louis Scala, subsequent to the issuance of the Certificate of Continued Occupancy, reviewed the Zoning Ordinance of the Township. Mr. Scala's investigation revealed that Tonnelle's property is located in the I-Industrial District as established by the Zoning Ordinance. The principal permitted uses in the Industrial District are:

> Uses of a light manufacturing nature, employing a process free from objectionable odors, fumes, dust, vibrations of noise, subject to performance standards.
>
> Wholesale business storage, distribution and warehousing.
>
> Truck Terminals.
>
> Motor vehicle repairs, but not automobile body repair shops.

Article III, Schedule III-C, Township of North Bergen Zoning Ordinance, April, 1987.

Tonnelle's type of use is commercial and not industrial, a use not permitted in the I-Industrial District. Therefore, based upon the zoning and other facts, Mr. Scala revoked the Certificate of Continued Occupancy on August 2, 1991.

Prior to the revocation of the Certificate of Continued Occupancy, Tonnelle commenced an action in lieu of prerogative writs by way of Order to Show Cause. The Honorable Joseph T. Ryan, J.S.C. granted Tonnelle's application, and on August 2, 1991 issued the Order to Show Cause with temporary restraints precluding the Township from restricting Tonnelle's business operations. These restraints were dissolved by Order of Judge Ryan on August 13, 1991. However, this Order was not to take effect until August 16, 1991 at 12:00 noon.

Tonnelle then filed an application with the Zoning Board of Adjustment of the Township of North Bergen ("Board") on August 15, 1991 seeking the following relief: "Such variances as the proposed use may require under N.J.S.A. 40:55D-70c and d, for a reversal of the Order of the Construction Code Official under N.J.S.A. 40:55D-70a and b for a certification of protected non-conforming use, N.J.S.A. 40:55D-68."

The Board held public hearings on August 18, 1991, October 29, 1991 and October 31, 1991. The Board considered Tonnelle's entire application inclusive of the appeal pursuant to N.J.S.A. 40:55D-70a and variance relief pursuant to N.J.S.A. 40:55D-70c and d on October 31, 1991.

The Board rendered its decision as to Tonnelle's appeal pursuant to N.J.S.A. 40:55D-72. The Board voted unanimously that the Construction Code Official acted appropriately in revoking Tonnelle's Certificate of Continued Occupancy (CCO) on August 2, 1991 and that the Township Zoning Ordinance did not permit commercial establishments in the I-Industrial Zone and therefore a use variance was required.

The Board continued the hearing and Tonnelle presented witnesses in furtherance of its application for a use variance.

The Board also considered the testimony of a professional planner retained by the Board, Michael F. Kauker. The Board, at the conclusion of the hearing on October 31, 1991, reserved decision until its next scheduled meeting. The Board reconvened on November 6, 1991 and discussed Tonnelle's application for a use variance. After completion of discussion, the Board voted unanimously to deny Tonnelle's request for a variance.

A memorializing resolution of the Board's decision was adopted in January, 1991.

A Pretrial Hearing was held before Judge Ryan on December 20, 1991 and a Pretrial Order was entered on that date scheduling trial for February 7, 1991. The trial was limited to the following issues:

1. Whether Tonnelle's property is located in a "*de facto*" commercial zone. (Fifth Count of Amended Complaint).

2. Whether North Bergen's Zoning Ordinance is violative of the Municipal Land Use Law. (Seventh Count of Amended Complaint).

3. Whether the Board's actions were arbitrary, capricious and unreasonable. (Twelfth Count of Fifth Amended Complaint).

Trial of this matter was conducted on February 7, 1992 at which time the court concluded that (a) North Bergen's Zoning Ordinance was not violative of the Municipal Land Use Law; (b) that the revocation of the Certificate of Continued Occupancy

issued to Tonnelle was proper based on an interpretation of the local zoning ordinance; and (c) remanded the variance issue pursuant to N.J.S.A.40:55D-70d(1) (use variance) to the Board of Adjustment for the purposes of determining whether the subject premises were particularly suited for the proposed use.

An Order was entered by the Court on February 19, 1992.

The Board, in accordance with Judge Ryan's Order of Remand, reconsidered Tonnelle's variance application at a hearing held on March 18, 1992. At the conclusion of the hearing, the Board affirmed its original denial of Tonnelle's use variance application. No memorializing resolution was adopted by the Board.

The trial court retained jurisdiction of this matter pursuant to the court's Order of February 19, 1992. A hearing was held by Judge Ryan on August 4, 1992 at which time Judge Ryan found that the Board was arbitrary in denying the variance and that the use variance should be granted.

The court entered an Order and Final Judgment as to Count Twelve of the Complaint on September 9, 1992. This judgment was reversed by the Superior Court of New Jersey, Appellate Division in accordance with its opinion filed May 11, 1994. App. 21a-30a. [1]

Thereafter, Judge Ryan determined that as a result of the Appellate Division's May 11, 1994 decision that no issues remained to be decided and entered judgment in favor of North Bergen. This judgment was summarily reversed by the Appellate

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1. Tonnelle filed a Petition for Certification of the Judgment of the Appellate Division, which Petition was denied by the New Jersey Supreme Court by Order filed July 15, 1994. *See* 137 N.J. 314 (1994).

Division by Order on Emergent Application dated July 14, 1994. App. 19a-20a.

Judge Ryan then reversed his previous decision, and based upon the "record" then existing, issued an opinion on January 26, 1995, (App. 13a-16a), which provided in part:

> At the oral argument on August 4, 1992 I made my decision that the denial of the variance had been arbitrary. At that time I reviewed the history of the case and commented on the big hurry that had taken place in March. I said that I did not intend to remand the case to any agency in North Bergen, because no agency would view it objectively. I also commented on the makeup of the Board of Adjustment which included the Mayor's brother and the aide to another commissioner.
>
> The history of this case together with the previous history of the industrial zone in question, makes it clear beyond a doubt that this business was denied a variance because of its distasteful nature, which, however, is constitutionally protected. Other commercial activities in the zone had been approved by variance or toleration.

(App. 15a).

The court, after review of Affidavits of Services of counsel, entered final judgment on May 26, 1995. App. 9a-12a.

This Judgment was reversed by the Superior Court of New

Jersey, Appellate Division, in accordance with its opinion filed July 17, 1996. (App. 1a-8a). Tonnelle petitioned the Supreme Court of New Jersey for certification which Petition was denied on November 13, 1996. App. 17a.

B. Correction of Misstatements in the Petition.

The opinions of the Superior Court of New Jersey Appellate Division correctly sets forth the facts of this case. App. 1a-8a and App. 21a-30a. In the interest of keeping this Brief brief, North Bergen respectfully directs the Court's attention to the Appellate Division opinions. The opinions, except for one inconsequential factual error, accurately reflect the facts and issues in this case.

Pursuant to United States Supreme Court Rule 15.2, North Bergen brings the following misstatements of fact in the Petition to the Court's attention.

Tonnelle, throughout the Petition, misrepresents that the lower court found that Tonnelle Avenue is a *de facto* commercial zone. The trial court made no finding that a *de facto* commercial zone exists. Even if such a "finding" was made, same was rejected by the Appellate Division in its opinion of May 11, 1994 (App. 21a-30a) which held in pertinent part:

> During the hearings before the Board, plaintiff's expert opined that the property was "well suited" for the proposed commercial use rather than a permitted use, because the recent development had been commercial uses rather than industrial. On the other hand, the planner retained by the Board disagreed, stating the proposal was "an insignificant small retail disparate retail use" for a large

> structure located in an area where 95% of the uses conformed to the zoning.
>
> The existence of other nonconforming uses in the vicinity of the proposed use is not, of itself, a special reason. See *Ward v. Scott*, 11 N.J. 117, 128 (1952); *Loscalzo v. Pini*, 228 N.J. Super. 291, 201 (App. Div. 1988), *certif. denied* 118 N.J. 216 (1989). The immediate past use (wholesale automobile sales) indicates that permitted uses can operate on the property. There is no proof in the record that permitted uses are inappropriate for the site, and there is no evidence that the video store would promote the general welfare as required by *Medici*.

App. 29a-30a. *See also* the Appellate Division Opinion of July 17, 1996. (App. 2a-3a).

Simply stated, the argument that a large number of commercial uses exist that support a *de facto* commercial zone is totally without basis in the record.

Tonnelle also refers to ordinances which "were introduced which were specifically aimed at Petitioner". Petition at 4. However, the ordinances referred to were repealed and never affected Tonnelle's use or operation while the case was pending. This fact does not appear in the Petition.

Tonnelle also asserts throughout the Petition that North Bergen has never attempted to enforce the zoning law against any retail store in the industrial zone except for Tonnelle and a juice bar. Petition at 6. However, no proofs have ever been

presented by Tonnelle as to the legality of any pre-existing non-industrial uses located on Tonnelle Avenue by variance or otherwise. A statement by counsel without a supporting basis in the record is not a fact, which was aptly observed by the Appellate Division.

Tonnelle further asserts that Louis Scala, North Bergen's Construction Code Official, testified that Tonnelle's "existing use was [not] contrary to the Zoning Ordinance". Petition at 6. This is false. Mr. Scala was testifying at a Zoning Board of Adjustment hearing on August 28, 1991 in reference to the contents of a particular violation notice, not that Tonnelle's use was permitted in the zone.

North Bergen must reiterate that a fact is not undisputed merely because same is stated by the attorney for petitioner.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI.

Tonnelle does not identify the special and important reasons under Supreme Court Rule 10 for granting its Petition for a Writ of Certiorari. It is apparent that Tonnelle seeks review of a decision of limited precedential value solely because it believes the Superior Court of New Jersey, Appellate Division reached the wrong conclusion in applying the governing legal principles from *Schad v. Borough of Mount Ephriam*, 452 U.S. 61 (1981) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) to the facts of this case. Although Tonnelle sets forth five bases for granting the Writ, the predominant theme is conflict with *Schad* and *Yick Wo*.

Tonnelle asserts that the New Jersey Appellate Division decision is in direct conflict with *Schad* and *Yick Wo*. Quite simply, the decision is not in conflict. These cases do not permit the operation of Tonnelle's business (merely because the business may be afforded certain First Amendment protection) in contravention to a facially valid constitutional zoning ordinance. The decision in *Schad* and *Yick Wo* reflect only differing outcomes based only on differing fact patterns and differing legal standards in place at the time, and certainly does not constitute a "conflict" that necessitates resolution by this court.

Since the New Jersey Appellate Division correctly applied the holdings of *Schad* and *Yick Wo,* Tonnelle's Petition is necessarily limited to the claim that the Appellate Division misapplied the legal standard to the particular facts of this case. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice,* § 4.17 at 193 (7th ed. 1993) (footnote omitted). This admonition is particularly apt in this case given the limited precedential effect of the decision below.

II.

THE APPELLATE DIVISION CORRECTLY ADDRESSED TONNELLE'S EQUAL PROTECTION CLAIMS AS NORTH BERGEN'S CONTENT NEUTRAL ZONING ORDINANCE CAN BE ENFORCED IRRESPECTIVE OF TONNELLE'S FIRST AMENDMENT CLAIMS.

The first issue raised by Tonnelle is that the New Jersey Appellate Division erred in its analysis of Tonnelle's equal protection claim.

It appears that Tonnelle's argument is that because its business operations may have some form of First Amendment protection, that all municipal ordinances and regulations are suspect and require strict scrutiny. Tonnelle continues to argue that there are other retail businesses located in the industrial zone where Tonnelle's property is located. This argument has been rejected twice by the New Jersey Appellate Division, first in the court's decision filed May 11, 1994 (App. 21a-30a) reversing the trial court's reversal of the denial of Tonnelle's use variance application and second in the Appellate Division's decision of July 17, 1996. App. 1a-8a.

There is no classification established in the North Bergen Zoning Ordinance that regulates, prohibits or implicates any activity afforded First Amendment protection. North Bergen's ordinance only regulates the location (based upon use criteria) where any commercial activity can occur. This facially valid constitutional zoning ordinance can be enforced irrespective of any First Amendment claim raised by Tonnelle. Tonnelle did not and can not cite a case to this Court that would permit the operation of its business in contravention of local zoning.

All cases cited by Tonnelle are distinguished from the case at bar. *Schad* is not in conflict and is distinguishable based upon the particular facts of that case.

Proving a deprivation of equal protection rights in a dispute with a municipal agency requires a distinct measure of proof, *Rivkin v. Dover Tp. Rent Leveling Bd.*, 143 N.J. 352, 380 (1996). That distinct measure of proof has not been satisfied by Tonnelle. No evidence has been presented by Tonnelle to establish a deprivation of equal protection rights. The same allegations and arguments have been raised by Tonnelle for the past five (5) years and have correctly been rejected by the New Jersey Appellate Division.

III.

THE ALLEGATION THAT TONNELLE WAS THE ONLY RETAIL FACILITY DENIED A VARIANCE IS IRRELEVANT.

Tonnelle alleges that Tonnelle was the only retail store denied a variance and therefore its petition should be granted. Again, it appears that Tonnelle is getting into its *de facto* commercial zone argument, which has twice been rejected by the New Jersey Appellate Division.

Assuming that Tonnelle is correct that it is the only retail business that was denied a variance to operate would not affect the conclusion reached by the New Jersey Appellate Division in its Opinion filed July 17, 1996. (App. 1a-8a). Nothing has been presented as part of the record which would indicate that North Bergen approved any variances for retail uses on Tonnelle Avenue within the past ten years and plaintiff's was the only one denied. The record is clear that any of the uses referred to predate 1987, and therefore this argument is again without merit. Simply stated, the mere fact that variances may have been granted to other retail uses in 1983 or 1984 are insufficient to support Tonnelle's allegation. Tonnelle consistently makes the same argument that (1) we applied for a variance and were denied and (2) this is a *de facto* commercial zone. The record does not support these arguments.

IV.

TONNELLE DID NOT ESTABLISH THAT THERE WAS CLEAR UNDISPUTED EVIDENCE OF ILLICIT MOTIVE.

Unfortunately, we must repeat that the mere allegation by the attorney for Tonnelle that a fact is undisputed does not make

it so. In any event, the allegation of police surveillance was raised previously before the trial court in another affidavit from Tonnelle's attorney, but even saying that police surveillance occurred is not sufficient to establish illicit motive.

In addition, Tonnelle claims that North Bergen brought no enforcement action against any other "retail" facilities located in the industrial zone. It appears that Tonnelle has problems with the standard of proof required. Tonnelle is the plaintiff. Tonnelle did not present any evidence to the trial court that a retail business was operating illegally in the industrial zone contrary to the provision of the North Bergen Zoning Ordinance which would merit an enforcement action. As previously stated, any retail use which existed in the industrial zone existed as a result of approvals which were granted in excess of ten years ago. Enforcement action was not required nor would it be relevant to Tonnelle's claims.

The distinct measure of proof required by *Rivkin, supra*, has not been satisfied as mere allegations or statements from counsel are not evidentiary.

V.

THE CHARACTER OF THE ZONE IS SUBSTANTIALLY INDUSTRIAL.

Tonnelle's Petition contains what can be characterized as the 95% solution. The New Jersey Appellate Division in its decision filed July 17, 1996 contained the following two statements:

> As noted in our earlier opinion, plaintiff's expert testified that the recent development in the zone had been commercial rather than

> industrial, and the Board's expert stated that 95% of the uses conformed to the zoning.

App. 6a.

> There was evidence that other commercial uses were granted variances, but 95% of the zone remained industrial.

App. 7a.

North Bergen candidly admits that these statements are in error.

Michael Kauker, a Professional Planner retained by the North Bergen Zoning Board of Adjustment testified before the Board that 21 out of 27 uses in the zone were conforming. This salient fact was also referred to by the Appellate Division:

> The essential facts relevant to the first appeal are that plaintiff's property is zoned for industrial use, and in that zone twenty-one of the twenty-seven properties conform to the use restrictions of the zoning ordinance.

App. 2a.

Mr. Kauker testified, and the Appellate Division found, that the property on which Tonnelle's retail use was to be introduced was 95% devoted to light industrial use. App. 24a and 30a. However, the reference by the New Jersey Appellate Division that 95% of the zone remained industrial is of no moment and would not affect the decision as there is no doubt that the record supports the conclusion that a substantial portion of the zone is in fact industrial.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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